Supreme Court, U.S.
FILED
FEB 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1051

In the Supreme Court of the United States

OCTOBER TERM, 1987

RUSSELL HOBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether there has been an intervening change of law concerning the predicate act requirement of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962, that entitles petitioner to challenge under 28 U.S.C. 2255 the sufficiency of the evidence supporting his RICO conviction even though the same claim was raised and rejected on direct appeal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 825 F.2d 364.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1987. A petition for rehearing was denied on September 23, 1987 (Pet. App. 7a-9a). The petition for a writ of certiorari was filed on December 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (RICO); conspiring to commit that offense, in violation of 18

U.S.C. 1962(d) (RICO conspiracy); importing marijuana, in violation of 21 U.S.C. 952(a); conspiring to commit that offense, in violation of 21 U.S.C. 963; possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to a total of 35 years' imprisonment and a $110,000 fine.[1] The court of appeals affirmed, *United States* v. *Bascaro*, 742 F.2d 1335 (11th Cir. 1984), and this Court denied certiorari, 472 U.S. 1017 (1985). Thereafter, petitioner sought collateral relief under 28 U.S.C. 2255. The district court denied the motion, and the court of appeals affirmed. Pet. App. 1a-6a.

1. The evidence at trial is summarized in the opinion of the court of appeals on direct appeal (742 F.2d at 1342, 1358-1359). It established the existence of a ring headed by co-defendants Antonio Bascaro and Manuel Villanueva that engaged in numerous drug smuggling ventures from late 1977 to early 1981. Petitioner was a "preferred customer[]" of the enterprise; he and co-defendant Michael Waldrop purchased marijuana from the organization on 25 to 30 separate occasions (*id.* at 1358).

In January 1979, co-conspirator Clyde Cobb decided to attempt to smuggle marijuana by airplane (38 R. 186). In mid-January, pursuant to Cobb's plan, James McDonnell flew a DC-3 airplane to Colombia, took on a cargo of marijuana, and flew back to Fort Lauderdale. The plane and its cargo were seized by federal and local law enforcement agents at the Fort Lauderdale airport. 32 R. 127, 151-154.

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[1] The court imposed the sentences as follows: consecutive terms of 7-1/2 years' imprisonment on the RICO and RICO conspiracy counts; consecutive terms of five years' imprisonment on each of the four controlled substances counts; and cumulative fines of $25,000 on each of the RICO counts and $15,000 on each of the controlled substances counts.

Two weeks later, McDonnell agreed to make a second attempt to smuggle marijuana by aircraft (32 R. 156-157). Coconspirator Patrick Waldrop had made a down payment of $1,500,000 to Cobb's brother-in-law, and Waldrop and petitioner consequently expected to receive a substantial part of the planeload of marijuana (38 R. 187; 40 R. 55). Waldrop and petitioner pressured Cobb to produce the marijuana or return the $1,500,000 (38 R. 220-223). On February 13, 1979, McDonnell and two others flew to Colombia in a Lockheed Constellation and obtained 25,795 pounds of marijuana (32 R. 140, 160-161). Trucks furnished by Waldrop and petitioner were readied to meet the airplane at a clandestine landing site to take possession of most of the Constellation's cargo (39 R. 10-12). On the return flight, however, fog and engine problems prevented the Constellation from landing at the clandestine site (32 R. 163-166). McDonnell finally landed at an airport in Panama City, Florida, in the early morning hours on February 14, 1979 (32 R. 166). Federal agents arrested the crewmembers and seized the marijuana (32 R. 132-140, 167; 38 R. 187-188). Several hours after the Constellation was supposed to have arrived at the prearranged site, petitioner telephoned Cobb to ask what had happened (39 R. 18).

2. The predicate acts of racketeering underlying petitioner's RICO convictions were the importation of the marijuana aboard the Constellation and the possession of that marijuana with intent to distribute it. On direct appeal, petitioner contended that those two offenses did not qualify as a "pattern of racketeering activity" within the meaning of the RICO statute, 18 U.S.C. 1961(5), because they arose out of a single criminal episode. The court of appeals rejected that argument, concluding that "[p]ossessing and importing marijuana are two separate crimes and consequently two separate acts for purposes of the RICO statute." 742 F.2d at 1360-1361. Petitioner sought review of that ruling in a petition for a writ of certiorari, but this Court denied the petition. 472 U.S. 1017 (1985).

3. On September 19, 1985, petitioner moved in district court to vacate his sentence under 28 U.S.C. 2255, arguing once again that the evidence failed to establish that he had engaged in a "pattern of racketeering activity." The district court denied the motion on the ground that the court of appeals' earlier rejection of the claim precluded collateral review. Pet. App. 4a. On appeal, the court of appeals found "no error in this reasoning" (*ibid.*). The court of appeals rejected the contention that it should reconsider its previous ruling in light of a footnote in this Court's intervening decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.14 (1985). The court of appeals explained (Pet. App. 4a-5a n.2) that the pertinent language in *Sedima* "does not necessarily change this circuit's rule, as applied in [petitioner's] direct appeal, that two separate crimes clearly constitute two separate acts for purposes of RICO."

ARGUMENT

1. Petitioner contends that he is entitled to relief from his RICO conviction under 28 U.S.C. 2255. It is well settled, however, that courts are not required to reconsider claims of error under Section 2255 that were unsuccessfully asserted on direct appeal. See *Kaufman* v. *United States*, 394 U.S. 217, 227 n.8 (1969); *Giacalone* v. *United States*, 739 F.2d 40, 42 (2d Cir. 1984); *United States* v. *Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981); *Ordonez* v. *United States*, 588 F.2d 448, 448-449 (5th Cir.), cert. denied, 441 U.S. 963 (1979); *Egger* v. *United States*, 509 F.2d 745, 748 (9th Cir.), cert. denied, 423 U.S. 842 (1975); *Stephan* v. *United States*, 496 F.2d 527, 528-529 (6th Cir. 1974), cert. denied, 423 U.S. 861 (1975); *Jackson* v. *United States*, 495 F.2d 349, 351 (8th Cir. 1974); *McGuinn* v. *United States*, 239 F.2d 449, 450-451 (D.C. Cir. 1956), cert. denied, 353 U.S. 942 (1957).

Petitioner raised on direct appeal precisely the same claim he raises here, and the court of appeals rejected it. *Bascaro*, 742 F.2d at 1360-1361.

Petitioner argues that the courts below should have reconsidered his claim on the merits because of this Court's intervening decision in *Sedima*. This Court has held that a defendant is not precluded from collaterally attacking his conviction on the basis of a claim that was rejected on direct appeal if there has been an intervening change in the relevant law. *Davis* v. *United States*, 417 U.S. 333, 341-342 (1974). But that principle is not applicable in this case, because *Sedima* did not change the law that was applied in *Bascaro*.

A "pattern of racketeering activity," as defined in 18 U.S.C. 1961(5), requires proof of at least two acts of racketeering activity committed during a single ten-year period. In *Sedima*, the Court observed (473 U.S. at 496 n.14) that while two acts of racketeering are necessary to establish a pattern under RICO, they "may not be sufficient." The Court explained that "two isolated acts of racketeering activity do not constitute a pattern"; rather, a pattern requires " '*continuity plus relationship*' " (*ibid.*, quoting S. Rep. 91-617, 91st Cong., 1st Sess. 158 (1969) (emphasis in original)). The Court went on to quote with approval the definition of "pattern" in the Dangerous Special Offender statute, 18 U.S.C. 3575(e), as " 'embrac[ing] criminal acts that have the same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events' " (473 U.S. at 496 n.14 (citation omitted)).

The footnote in *Sedima* on which petitioner relies stands for the proposition that isolated, unrelated acts may not satisfy the requirement of a "pattern" under RICO. But petitioner's acts of racketeering were anything but isolated. Rather, his importation and possession offenses "were closely related to each other and to the ongoing objective of narcotics smuggling."

United States v. *Fernandez*, 797 F.2d 943, 951 n.5 (11th Cir. 1986), cert. denied, No. 86-1577 (June 22, 1987). The issue in this case is not whether petitioner's offenses were too isolated or sporadic to qualify as a "pattern"; it is whether his offenses failed to meet the "pattern" requirement because they arose out of the same criminal episode and thus were too closely related. The *Sedima* footnote simply did not address that issue. The court of appeals was therefore correct in concluding (Pet. App. 4a-5a n.2) that *Sedima* did not change the relevant law that was applied on direct appeal in *Bascaro*.

2. In *United States* v. *Kragness*, 830 F.2d 842, 860-861 (8th Cir. 1987), the court held that the offenses of importing marijuana and possessing marijuana with intent to distribute it do not constitute a "pattern of racketeering" where they arise out of the single act of shipping marijuana into the United States. Even if the position taken by the court in *Kragness* is legally correct when the importation and possession offenses arise from a single criminal act, the analysis employed by the Eighth Circuit may require a different result in a case such as this one, where the defendant engages in a series of acts over a period of time that relate to the two predicate offenses.[2]

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[2] The RICO statute does not prohibit reliance on two or more acts of racketeering that arise from the same criminal episode. See, *e.g.*, *United States* v. *Phillips*, 664 F.2d 971, 1039 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Weatherspoon*, 581 F.2d 595, 601-602 (7th Cir. 1978); *United States* v. *Parness*, 503 F.2d 430, 441-442 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Nonetheless, the Department of Justice has established a policy against charging multiple predicate acts based on a single episode of criminal conduct. As the *Kragness* court observed (830 F.2d at 861) using marijuana possession and importation offenses as separate acts of racketeering activity when they are based on a single criminal act is contrary to that policy. Using those two charges as separate predicate acts was contrary to the terms of the authorization

In any event, *Kragness* was decided after the decision of the court of appeals in this case, and the Eleventh Circuit therefore did not have the opportunity to consider it. Furthermore, even if *Kragness* had come first, it would not have constituted an intervening change in the law of the Eleventh Circuit requiring that court to reconsider its initial rejection of petitioner's claim. The judgment below—that petitioner's claim does not justify relief under Section 2255 on the basis of an intervening change in the law—is therefore correct.[3]

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approving the prosecution in the *Kragness* case; the treatment of the possession and importation offenses in *Kragness* as separate predicate acts was apparently the result of an error in the prosecutor's interpretation of the terms under which the prosecution in that case was authorized. We are advised that the *Kragness* decision has prompted the Organized Crime and Racketeering Section of the Department's Criminal Division, which is responsible for reviewing and authorizing all RICO prosecutions, to take steps to make the terms of its approval more explicit with respect to the Department's policy against charging as separate racketeering acts multiple offenses that arise out of a single criminal episode. For that reason, we do not anticipate that the problem presented by the *Kragness* case—and in different form by the present case—will arise with any frequency in the future.

[3] We note that any error in counting the importation offense and the possession offense as separate acts of racketeering would not require reversal of petitioner's RICO conspiracy conviction (or any of his convictions on the controlled substances counts). To prove a RICO conspiracy, the government must show only that the defendant agreed to commit two predicate acts of racketeering in furtherance of the enterprise; it need not show actual commission of those offenses. See, *e.g.*, *United States* v. *Carter*, 721 F.2d 1514, 1529-1531 (11th Cir.), cert. denied, 469 U.S. 819 (1984). Even if the evidence failed to show that petitioner actually engaged in a "pattern of racketeering," it clearly established that he agreed to do so—that is, that he agreed both to import marijuana and to possess marijuana with an intent to distribute it as temporally distinct acts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1988